

Opinion No. 13-1028

April 28, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Howell Earnest, Traveling Auditor, Santa Fe, New Mexico.

ERRONEOUS TAXATION.

Relief from erroneous taxation may be had under provisions of Sec. 26, Ch. 84, Laws of 1913.

OPINION

{*192} On the 24th of March, you wrote to me enclosing a letter from the Treasurer of Quay County on the subject of the manner of refunding taxes erroneously paid and asking me if Sections 4070 and 4072 had been repealed and, if so, what act covered the refunding of erroneous taxes. You also inquired whether such refund should be paid out of the general county fund or pro rated among the various funds to which credit was given originally at the time the taxes were paid.

{*193} As the letter from the County Treasurer referred to an opinion of his district attorney, I felt unwilling to answer your letter until I could discuss the matter with that district attorney, to whom I immediately wrote and after some delay, due to the fact of his being closely occupied in trials in court, I received an answer to the effect that the opinion which he had given was written before the law of 1913 was adopted and that he did not have it in mind, and he further stated that what effect the new law might have he had not had time to investigate. I thought that he might write to me again, although he said nothing about doing so, but as I have not heard from him I cannot longer delay answering your letter.

Section 4070 of the Compiled Laws of 1897 covers the case of any person who pays a tax, interest or costs or any portion thereof which shall thereafter be found to be erroneous or illegal and authorizes the Board of County Commissioners to refund the same without discount; while Section 4072 authorizes the refund to a purchaser at a tax sale of the amount paid by him with interest when there was no tax due on the real estate sold.

As to Section 4070, I am quite clear that it is superceded by Section 26 of the Laws of 1913, which will, I believe, be printed as Chapter 84 of the laws when published. That Section 26 makes it the duty of district attorneys, in any case where a person pays any tax, penalty, interest or costs which thereafter is found to be erroneously or illegally charged, to submit the matter to the district court and upon the order of the court the amount of the erroneous payment shall be refunded. This takes away from the County Commissioners any jurisdiction to refund any money erroneously paid for taxes.

As to Section 4072, it is not clear that it is covered by anything in the act of 1913. That section provides that when, by mistake or wrongful act of the collector, clerk, assessor or from double assessment, real estate has been sold on which no tax was due at the time of sale, the county shall refund to the purchaser the amount paid by him with interest thereon, and the county officer responsible for the mistake or misconduct, shall be liable on his official bond to the county for all losses sustained by the county from such sales. While it does not distinctly authorize the Board of County Commissioners to order the refund, yet as the county is required to refund the money, this becomes a part of the business of the County Commissioners, who are the representatives of the county and charged with looking after the county business in all cases where no definite, specific provision is made by law. The presentation by a purchaser at a tax sale for the refunding to him of the money which he has paid, appears to be like any other claim against the county and may be allowed and ordered paid by the County Commissioners.

Your other question is as to whether such refunds should be paid out of the general county fund, or pro rated among the various funds to which credit had been given when the money was originally received. As the other county funds may be from five to seven times as great as the general county fund, the levy for which is limited to five mills, it would be manifestly unjust to put the burden of these payments entirely on the general county fund, and I believe that the amount of any refund should be pro rated, as your question suggests. The only practical difficulty that I can see, aside from the inconvenience {*194} of a bookkeeping character, is that some funds to which the money was originally distributed, might be temporary funds which are out of existence at the time the refund is made, but I do not think that could be a serious matter.

I return herewith the letter from the Treasurer of Quay County.